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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

INCHRIST COMMUNITY CHURCH VALLEY CHAPEL, et al., Plaintiffs and Respondents, v. KEEDAE KIM, et al., Defendants and Appellants.	B287139 (Los Angeles County Super. Ct. No. BC568720)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Susan Bryant-Deason, Judge. Affirmed.

Obagi Law Group, Zein E. Obagi, and McCallion & Associates, Kenneth F. McCallion, for Defendants and Appellants.

Law Office of Gregory M. Lee, Gregory M. Lee, for Plaintiffs and Respondents.

I. INTRODUCTION

Plaintiffs Hyuk Choi (Pastor Choi) and his church, InChrist Community Church Valley Chapel (InChrist), successfully sued defendants[1] for defamation based on their publication of internet articles criticizing plaintiffs' operation of certain Korean-American churches in the Los Angeles area.

On appeal from the judgment awarding plaintiffs damages for defamation per se, defendants contend that the trial court erred when it ruled plaintiffs were not limited purpose public figures, as defined by relevant defamation case law. In addition, defendants challenge the trial court's denial of their new trial motion, arguing that the trial court: (1) erred by including in the special verdict forms statements by defendants that were not defamatory as a matter of law; (2) abused its discretion by excluding two negative news articles about plaintiffs and testimony from the nonparty author; (3) abused its discretion by ruling that the damages awarded were not excessive; and (4) abused its discretion by delaying Pastor Choi's cross-examination for one day due to his illness.

We hold defendants forfeited their challenges to the trial court's rulings on the public figure issue, the contents of the jury verdict forms, and the exclusion of the nonparty articles and the testimony of their author. We further hold the trial court did not abuse its discretion by ruling the damages were not excessive and

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[1] Defendants are Keedae Kim, individually, and doing business as NewsM.com (NewsM), Jae Young Yang, Byong In Choi, individually, and doing business as NewsNJoy.us, and NewsM, Inc.

delaying Pastor Choi's cross-examination for one day due to his illness. We therefore affirm the judgment.

II. FACTUAL[2] AND PROCEDURAL BACKGROUND

A. *Parties and Events Leading to Litigation*

In October 2006, Pastor Choi was ordained a Presbyterian minister. From 2008 to 2013, he served at Light of Love Mission Church (Light of Love); he became senior pastor there in 2011. In April 2013, Pastor Choi resigned from Light of Love on short notice.

On May 1, 2013, Pastor Choi started a new church[3] in Downey called InChrist Community Church (the Downey Church). In late May 2013, Pastor Choi was contacted by an assistant pastor of World Vision Church in Northridge about a vacancy in the senior pastor position at that church. After meeting and negotiating with church representatives, Pastor Choi accepted the position at the World Vision Church in June 2013 on the condition, among others, that the church change its name to InChrist Community Church Valley Chapel (Valley Chapel). In June 2013, Valley Chapel merged with the Downey

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[2] We state here only those background facts necessary to provide context for the legal discussion that follows. The trial evidence relevant to defendants' various contentions on appeal is set forth in each of the discussion sections analyzing those issues.

[3] Pastor Choi referred to starting a new church as "planting a church."

Church to form plaintiff InChrist, and Pastor Choi became senior pastor of the merged entity.

Defendant NewsM was a Christian-based news website focusing on religious issues, including Korean churches in the Los Angeles area. It was wholly owned by NewsM, Inc. Defendant Byong In Choi was the sole shareholder and CEO of NewsM, Inc. and the CEO of NewsM.

Defendant Keedae Kim was the head pastor of Church of Peace, a Presbyterian church. He was also the editor-in-chief of NewsM beginning in April 2014. He reviewed and approved all of the articles written about plaintiffs by defendant Jae Young Yang.

B. *The NewsM Articles*

On June 9, 2013, NewsM published an article about Pastor Choi's acceptance of the senior pastor position at World Vision Church soon after leaving Light of Love and planting the Downey Church. According to the article, "pastors in the [Los Angeles] region [were] reacting with the criticism that 'it is like dumping the Downey congregation who took part in planting the church.'"

Sometime before June 25, 2014, defendant Yang telephoned InChrist and asked to speak to Pastor Choi, but was transferred to Pastor Dae Il Han. Yang told Pastor Han that he was writing an article about the church. Pastor Han spoke to Yang about the two different locations of InChrist. On June 25, 2014, NewsM published an article describing InChrist's opening of a new chapel and attributed certain statements to Pastor Han, each of which he denied making. Following the publication of the article, Pastor Han left a voicemail message for Yang telling him that the

quotes attributed to him were incorrect. Yang, however, did not return Pastor Han's telephone call.

Between May 29, and September 18, 2014, NewsM published a series of critical articles about plaintiffs accusing them of being "professional church hunters," akin to corporate raiders, who plundered church assets and misused church finances for their own personal gain. Among other things, the articles accused Pastor Choi of taking church revenues from the sale of CDs of his sermons for personal use and transferring World Vision Church real estate, including valuable "parkland," to InChrist to artificially inflate InChrist's asset value.

On September 23, October 23, and December 3, 2014, plaintiffs' attorney wrote letters to NewsM demanding that it: cease publishing defamatory articles about plaintiffs; correct false statements in past articles; publish retractions of all past false articles; and publish acknowledgements of the falsity of past articles.

C. *Defamation Complaint*

On January 7, 2015, plaintiffs filed their complaint for defamation against defendants. The complaint alleged that, beginning in June 2014 and continuing through the present, defendants published a series of defamatory articles about plaintiffs. The complaint specified the following eight allegedly false statements as the basis for plaintiffs' defamation claims: "(a) That Pastor Choi lacked theological training, [was] a bad pastor without religious conviction, and that his sole goal was as a professional church hunter and corporate raider to acquire church assets by false means for his own personal gain (and for

the gain of [InChrist]), and that the corporation [InChrist] was his personal tool to acquire power and money. [¶] (b) That [P]astor Choi took power over World Vision Church, and somehow did a merger with [InChrist], for the sole purpose [of stealing] from World Vision Church the real property it owned, the church site as well as 10 acres of land called parkland. That [InChrist] was transferred such property under [its] name by [P]astor Choi. In other words, that Pastor Choi and [InChrist] ha[d] committed theft. [¶] (c) That Pastor Choi use[d] church assets as his own private property for his personal use and gain. As an example, that Pastor Choi conducted sermons placed on CD's using church money for their production and sale, and that the entire sales income went personally to [P]astor Choi. In other words, that Pastor Choi ha[d] committed theft. [¶] (d) That Pastor Choi and [InChrist] ha[d] illegally terminated [a]ssociate[d] [p]astors [because] they were not obedient to Pastor Choi. [¶] (e) That Pastor Choi did not become president and head pastor of World Vision Church until July 21, 2013, but that he had already changed World Vision Church to InChrist . . . on May 1, 2013, and transferred the property of World Vision Church to InChrist . . . . In other words, that it was part of a fraudulent scheme perpetrated by Pastor Choi. [¶] (f) That Pastor Choi prior to becoming president and head pastor of World Vision Church became pastor of the Downey Church which became InChrist . . . . That as [a] result of Pastor Choi becoming Pastor of World Vision Church (which became [InChrist]), he abandoned the congregation of the Downey Church. [¶] (g) That a letter of the prior World Vision Church pastor Jae [Y]eon Kim aka Jae Young Kim was published that claimed that Pastor Choi used fraud, trickery[,] and betrayal to gain power over the World

Vision Church, with promises that Pastor Kim would be Pastor Emeritus and would receive monies from the church. [¶] (h) That Pastor Choi and [InChrist] left a denomination that World Vision Church was a member."

D. *Trial*

A jury trial on plaintiffs' defamation claims began on August 14, 2017, and concluded on September 13, 2017, after 18 days of trial, testimony from multiple witnesses, and the admission of numerous documents. Following the evidentiary phase of the trial, the parties agreed to submit four special verdict forms to the jury on plaintiffs' defamation per se and defamation per quod claims.[4] The two special verdict forms for plaintiffs' defamation per se claims asked jurors whether defendants made "one or more of the following statements, to persons other than plaintiff[s]," and then listed 15 published statements. The special verdict forms did not, however, ask jurors to specify which, if any, of the statements were defamatory.

Following trial, the jury returned special verdicts in favor of plaintiffs which awarded them actual damages as follows: For defamation per se, InChrist was awarded $1.00 for harm to its property, business, trade, profession, or occupation; and $100,000

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[4] "A statement is libelous 'per se' when on its face the words of the statement are of such a character as to be actionable without a showing of special damage. A libel 'per quod,' on the other hand, requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154.)

for harm to its reputation. But InChrist was not awarded any actual damages for defamation per quod.

For defamation per se, Pastor Choi was awarded actual damages of $75,000 for harm to his property, business, trade, profession, or occupation; $250,000 for harm to his reputation; and $250,000 for shame, mortification, or hurt feelings. Pastor Choi was also awarded $300,000 in actual damages for defamation per quod. Plaintiffs' total damage award was $975,001. The trial court entered judgment on the verdicts on September 18, 2017, and an amended judgment on October 17, 2017, that added a cost award of $35,422.63.

E. *Posttrial Motions*

On November 14, 2017, the trial court held a hearing on defendants' motions for new trial and a judgment notwithstanding the verdict (JNOV). That same day, the trial court issued a minute order denying defendants' motion for new trial, but granting, in part, defendants' motion for JNOV as to the $300,000 awarded Pastor Choi for defamation per quod. On January 29, 2018, the trial court entered an amended judgment that eliminated the $300,000 damage award to Pastor Choi for defamation per quod. The amended judgment awarded $100,001 to InChrist and $575,000 to Pastor Choi, plus $35,422.63 in costs to plaintiffs.

III. DISCUSSION

A. *Limited Purpose Public Figure*

Defendants contend the trial court erred in concluding that plaintiffs were not limited purpose public figures under the defamation law. According to defendants, the "weight of the substantial evidence introduced at trial show[ed] that [plaintiffs] . . . were limited purpose public figures, not private one[s]. The jury was, therefore, given an erroneous jury charge on this issue [which omitted the element of malice]."

1. Background

Following the defense case, the trial court held a hearing and determined that plaintiffs were not limited purpose public figures, reasoning as follows: "The Court: . . . I agree that this [case] is like *Grenier* [*v. Taylor* (2015) 234 Cal.App.4th 471] because . . . [Pastor Choi] made decisions about not being with one church and going with another church. And then he received an invitation to merge with a third church, and he took it, and it looks like that [decision] ruffled some feathers along the way. Clearly . . . people got very upset for their various reasons. [¶] But the allegations that were then made was that he was involved in a scheme, to put it lightly, to steal church funds and that this whole thing was a plot. . . . [¶] And . . . some of [the allegedly defamatory statements were] per quod, but [others] per se. When somebody says, . . . 'Where's the money? What have you done with all the money? And you're doing this so you don't ever have to answer to anybody anymore, and you can use the

money however you want,' that is per se. That's defamation per se because you've alleged a crime, ... [¶] So [Pastor Choi] chose not to engage, and that's the voluntary aspect of it. . . . But once the allegation comes out [that] . . . he has got this big scheme to steal money and to steal the money from the church and the church members, it changes the whole . . . basis. It changes the whole groundwork of what's happened. [¶] And that is what . . . he did not voluntarily put himself in. He was drawn in and he didn't respond. I mean, this could have been an all-out battle, but interestingly enough, it hasn't been. It's been attack mode. [¶] . . . I think he's a private figure. I'm sure the community that belonged to this church or to . . . the other churches who don't agree may feel that he's a very public figure, but I don't think so. Not in terms of the law. [¶] . . . That's my ruling."

2. Legal Principles

"When a defamation action is brought by a public figure, the plaintiff, in order to recover damages, must show that the defendant acted with actual malice in publishing the defamatory communication. (*Mosesian* v. *McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1688-1689 . . . .) Because of this increased burden, defendants in defamation actions . . . obviously attempt to establish that the plaintiff was such a public figure. This is a question to be determined by the court, rather than the jury. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1610 . . . .)" (*Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 933.)

"There are two types of public figures: 'The first is the "all purpose" public figure who has "achieve[ed] such pervasive fame

or notoriety that he becomes a public figure for all purposes and in all contexts." The second category is that of the "limited purpose" or "vortex" public figure, an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.'" [Citation.]" (*Sipple v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 247.)

"'*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845-846 . . . sets forth the elements that must be present in order to characterize a plaintiff as a limited purpose public figure. First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy.' [Citation.]" (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 24.)

3. Standard of Review

"At trial, whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. [Citations.] On appeal, the trial court's resolution of disputed factual questions bearing on the public figure determination is reviewed for substantial evidence, while the trial court's resolution of the ultimate question of public figure status is subject to independent review for legal error. [Citations.]" (*Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 264 (*Khawar*); see also *Denney v.*

Lawrence, supra, 22 Cal.App.4th at p. 933 ["The trial court's decision on the question whether a plaintiff is a limited public figure is a mixed question of law and fact. It must determine the predicate facts upon which it then concludes whether, as a matter of law, a plaintiff is or is not a limited public figure. [Citation.] When the appellate court is called upon to review the trial court's decision in this regard, its standard of review is whether, after an independent review of the entire record, substantial evidence supports the trial court's decision. [Citation.]"]; *Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 204.)

"When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Under the substantial evidence standard, the reviewing court engages in a two-part analysis. "First, [the court] must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, [the court] must determine whether the evidence thus marshaled is substantial." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.)

Under the substantial evidence standard, the reviewing court does not make credibility judgments, reweigh the evidence, or resolve evidentiary conflicts. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Rather, the reviewing court's task is limited to determining whether any rational finder of fact could have reached the decision below based upon the evidence

presented. (*Alberda v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 214 Cal.App.4th 426, 435.)

4. Burden on Sufficiency Challenge

"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown [by the appellant]. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the affirmative burden to provide an adequate record on appeal to allow the reviewing court to assess the claimed error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

In addition, when an appellant contends that a finding of the trial court is not supported by the evidence, he or she is required to set forth all of the material evidence on that finding, not merely the evidence favorable to his or her position. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "In furtherance of its burden, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. [Citation.] Further, the burden to provide a fair summary of the evidence 'grows with the complexity of the record.'" (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) "'[An appellant] cannot shift this burden onto [the] respondent, nor is a reviewing court required to undertake an independent examination of the record when [the] appellant has shirked his responsibility in this respect.' [Citation.]" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.) If the

appellant fails to carry this burden, the reviewing court may deem the substantial evidence contention waived. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.)

5. Analysis

Here, defendants' statement of facts highlights portions of their evidence at trial, in a light most favorable to their various defenses at trial. Defendants, however, do not specify the evidence—from both sides—on the discrete issue of whether plaintiffs were limited purpose public figures. Moreover, in their discussion of the public figure issue, defendants make no attempt to set forth fairly all the evidence which arguably supports the trial court's finding, or to explain why that evidence was insufficient to support the trial court's conclusion that plaintiffs were not limited purpose public figures. Instead, they urge us on appeal to reconsider and reweigh their evidence on the issue and substitute our judgment for that of the trial court in direct contravention of the mandates of the substantial evidence rule discussed above.

Absent a good faith attempt in the opening brief to set forth *all of the evidence* on the limited purpose public figure issue, we are hampered in our ability to conduct a review for substantial evidence. Based on the defamation authorities cited above, the trial court was tasked with the threshold determination of whether plaintiffs had voluntarily thrust themselves, or were otherwise drawn, into a public controversy to such an extent that they became limited purpose public figures as a matter of law.

After reviewing the parties' respective evidence on the issue and considering the arguments of counsel, the trial court concluded that plaintiffs had not voluntarily become involved in such an issue.

We presume the trial court was correct in its predicate findings on the public figure issue. In light of that presumption, the burden was on defendants to affirmatively demonstrate in their opening brief a lack of substantial evidence to support the court's conclusion. Because defendants have failed at the outset to carry their burden on their public figure claim, we must affirm the trial court's finding that plaintiffs were private figures.

Moreover, even if we were to reach the merits of defendants' limited purpose public figure contention based on the evidence cited in their abbreviated factual discussion of the public figure issue, we would nevertheless affirm the trial court's decision. According to defendants, the following facts demonstrated that plaintiffs were limited purpose public figures, not merely private ones: Pastor Choi (1) was able to sell CDs of his sermons for "$22-$25 each;" (2) was not merely a priest, but a pastor or "spiritual overseer;" (3) was a past president of a regional board of Korean-American churches, the Council of Korean Churches of Southern California, which was purportedly comprised of about 1,300 churches; (4) was the center of a controversy involving the administration of three Korean-American churches; and (5) in his complaint, alleged that he was a pastor of renown in the Korean community.

Under the substantial evidence standard discussed above, we presume that the trial court considered each of these facts and any arguments and conflicting evidence concerning them and concluded they were insufficient, either separately or collectively,

to show that plaintiffs were public figures. Defendants repeatedly assert that Pastor Choi was the past president of a regional council of Korean churches, which defendants describe as including 1,300 churches. The record on the significance of Pastor Choi's position, however, was disputed at trial. Defendant Yang testified that he understood the council included 1,300 members, but he did not explain the basis for his understanding on this point. Pastor Choi, by contrast, testified that no churches were registered with the council, and only five churches "helped" with council affairs. Under the governing standard of review, we must presume that the trial court resolved this factual dispute in favor of plaintiffs, i.e., the trial court believed Pastor Choi's testimony about the council's lack of church membership and thus gave little, if any, weight to the fact that Pastor Choi was its past president.

More importantly, none of these facts—that Pastor Choi was able to sell CDs, was a pastor or spiritual overseer, or was president of the council—was relevant to the finding challenged on appeal, that plaintiffs had not voluntarily injected themselves into an issue of public controversy of consequence to the members of the community who had an interest in it. "[A]lthough [Pastor Choi] thrust himself into the public eye as an expert on the Bible and its teachings, that alone did not cause him to become a limited purpose public figure in the context of this case[,]" namely, whether he was a church hunter, thief, or fraudster. (*Grenier v. Taylor*, *supra*, 234 Cal.App.4th at p. 485 [a pastor who published a book, ran a website, hosted a radio show broadcast to numerous states, and made sermons available on YouTube, iTunes, and Twitter was not a limited purpose figure in the context of the lawsuit, where defendants accused him of

committing child abuse, child molestation, tax evasion, and theft].)

As to the controversy involving Pastor Choi's administration of the three churches in issue, as the trial court explained in its ruling, although defendants' news articles may have attempted to implicate Pastor Choi in certain alleged controversies involving those churches and his alleged misuse of their assets and revenue for his own gain, plaintiffs submitted evidence showing that the pastor tried to quell any such controversies that may have arisen in the community based on the articles. Among other things, he immediately instructed his counsel to send letters to defendants demanding that that they cease publication of future articles about the controversies and retract the past false articles. That evidence supported a reasonable inference that Pastor Choi had not voluntarily injected himself into the controversies created by defendants' articles. While there was evidence that Pastor Han spoke on one occasion to defendant Yang, we decline to find that Pastor Han's single response to Yang's telephone call was sufficient to render InChrist or Pastor Choi a limited purpose public figure because it did not demonstrate the type of "media access sufficient to effectively counter media-published defamatory statements." (*Khawar*, *supra*, 19 Cal.4th at p. 266.)

Our Supreme Court's decision in *Khawar*, *supra*, 19 Cal.4th 254 is instructive. In that case, the plaintiff was interviewed by a local television station *after* defendant newspaper published the defamatory newspaper article identifying the plaintiff as Robert F. Kennedy's assassin. (*Id.* at pp. 260-261.) Although Han's interview in our case occurred *before* the publication of defendants' newspaper articles, the reasoning of *Khawar* applies

with equal force here: "'[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' (*Hutchinson v. Proxmire* [(1979)] 443 U.S. 111, 135 . . . .])" (*Id.* at p. 266.)

Finally, contrary to defendants' suggestion, the trial court was not required to treat plaintiffs' conclusory allegation that Pastor Choi was a "renowned" pastor as fact. Generally, allegations of such conclusions of fact or law, opinions, or speculation are disregarded by trial courts when construing the factual basis of a complaint. (See *Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1111.) Given that it was the exclusive province of the trial court to weigh such "evidence," the trial court could have reasonably concluded that the "renown" allegation was otherwise factually unsupported and on that basis accorded it no weight.

B. *Defective Special Verdict Forms*

1. Contentions

Defendants next contend that the "evidence at trial was insufficient to justify the jury's finding of liability [for defamation per se] as a matter of law." As stated, defendants' contention appears on its face to be a challenge to the sufficiency of the evidence. But, defendants then argue that one or more of the allegedly defamatory statements included on the per se special verdict forms was not defamatory as a matter of law (i.e., one or more of the statements, on its face, constituted protected opinion, fair comment, or hyperbole) and therefore should not have been

included in the forms.[5] According to defendants, because the verdict forms premised liability on a finding that only one of the many statements was defamatory, "the jury verdict may well have been based on a statement that had no basis in law or evidence to permit a verdict as a matter of law. [¶] Where there is an error in a special verdict form submitted to the jury, a new trial is [the] appropriate remedy." Defendants thus raise a challenge—not to the sufficiency of the evidence—but to the content of the special verdict forms themselves.

In response to defendants' challenge to the special verdict forms, plaintiffs argue, among other things, that defendants waived[6] their challenge to the forms by not only failing to object

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[5] Defendants do not challenge at least two of the 15 statements that are listed in the verdict forms: (1) "'The sales revenue, without ever being reflected in the church's budget and account, was used personally by Pastor Hyuk Choi'"; and (2) "'Where Are the Proceeds from the Sale of Pastor Hyuk Choi's Sermon CD's, Level of Financial Management Where Money Pouch Becomes Pocket Money.'"

[6] Although plaintiffs use the term waiver, the correct term, under the circumstances presented here, is forfeiture. "Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably. The United States Supreme Court recently observed, however: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" (*United States v. Olano* [(1993) 507 U.S. 725, 733 . . .].)' (*People v.*

to the content of the special verdict forms, but by agreeing to the content of those forms. According to plaintiffs, during the conference about jury instructions and special verdict forms, "counsel for . . . [d]efendants did not make a single objection to the wording of the fifteen [defamatory] statements" and "there was agreement on the fifteen statements found in the special verdicts for defamation per se."

2. Forfeiture

It is well established that a party may forfeit purported errors in a special verdict form by failing to object before the trial court discharges the jury. "[W]e agree with [the plaintiff] that [the defendant] has waived this alleged defect in the special verdict form. The rules are well settled. "'If the verdict is ambiguous the party adversely affected should request a more formal and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient verdict." [Citations.]' (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456 . . . .) A party who fails to object to a special verdict form ordinarily waives any objection to the form. (*Lynch v. Birdwell* (1955) 44 Cal.2d 839, 851 . . . ; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131 . . . .) However, waiver is not automatic, and there are many exceptions. (*Woodcock v. Fontana Scaffolding & Equip. Co., supra*, [69 Cal.2d] at p. 456, fn. 2.) For example, '[w]aiver is not found where the record indicates that the failure to object was

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Saunders (1993) 5 Cal.4th 580, 590, fn. 6 . . . .)" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)

not the result of a desire to reap a "technical advantage" or engage in a "litigious strategy." [Citations.]' (*Ibid.*) Nor is an objection required when the verdict is fatally inconsistent. (*Morris v. McCauley's Quality Transmission Service* (1976) 60 Cal.App.3d 964, 972 . . . .)" (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 529-530; *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242 [when a purported defect in the verdict form was apparent at the time the jury rendered the verdict, the failure to object and request clarification or deliberation before the trial court discharged the jury precludes a party from later challenging the verdict].)

3. Analysis

In their posttrial motions for new trial and JNOV, defendants argued, as they do here, that the verdict forms were defective because they included some statements that were not, on their face, defamatory, but rather merely opinion, fair comment, or hyperbole. In response, plaintiffs argued that because *defendants' proposed special verdict forms* contained all of the defamatory statements about which they were complaining posttrial, "[d]efendants may not claim error for the defamatory statements they requested in their own [s]pecial [v]erdict forms."

In ruling on the posttrial motions, the trial court rejected defendants' belated challenge to the verdict forms, reasoning as follows. "As a procedural matter, the court notes that [d]efendants failed, with one exception, to cite to the record regarding any court order, or [d]efendants' claimed objections to that order, regarding which statements were to be included on the jury instructions or verdict forms. Defendants broadly state

that they 'repeatedly challenged these statements before trial, submitted a proposed verdict form containing such statements for trial only at the [c]ourt's request, and continued to challenge these statements at trial.' . . . Defendants fail to identify when the court requested such statements be included, and fail to cite to examples of their argument at trial regarding these statements. As for pretrial matters, [d]efendants' only evidence is that they raised the issue in their motion for summary judgment. However, due to procedural errors with that motion, the court never reached the issue of factual statements versus opinion statements. . . . [¶] In sum, the court is highly skeptical of [d]efendants' assertion that [they] previously, repeatedly raised the issue of factual statements versus opinion statements, except in the context of the summary judgment motion. At a minimum, the court has reviewed its own copy of the transcript for September 1, 2017, at which time the court and counsel for both parties went through . . . CACI [No.] 1702, which is the jury instruction containing the disputed statements, and the special verdict forms, and there does not appear to be any discussion of whether the statements constituted facts or opinions. In other words, as far as the court can tell, this issue was never addressed. Defendants filed no motion for reconsideration or motion for new trial following denial of the motion for summary judgment; filed no motions in limine; and raised no objections to the content of the statements included in the jury instructions and the verdict forms."

We agree with plaintiffs that defendants have forfeited their challenge to the special verdict forms by failing to object in the trial court to the inclusion of any of the 15 statements in those forms. The record at trial strongly suggests that not only

did defendants fail to affirmatively object to the statements on the grounds now advanced on appeal, they either agreed to or, at a minimum acquiesced in, their inclusion in the subject verdict forms. Under the authorities discussed above, they cannot at this stage challenge them on appeal.[7]

C. *Exclusion of Nonparty News Articles and Testimony from The Author*

Defendants contend that the trial court abused its discretion when it excluded two articles from a Korean-American newspaper, the Korea Daily, and testimony from the author concerning the content of those articles. According to defendants, the articles "were highly relevant to the issues concerning [plaintiffs'] status [as limited purpose public figures], as well as the issue of damages." Defendants maintain that, because the two articles showed that "the issues underlying [plaintiffs'] defamation claims were 'reported from other agencies as well,'" they were relevant to the issue of "causation." Defendants further maintain not only that the excluded testimony of the articles' author, Yeol Jang, would have "helped establish that Pastor Choi was a limited purpose public figure in the Korean-

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[7] We note that defendants did not address plaintiffs' forfeiture contention in their reply brief. Given the trial court's ruling on this issue quoted above and that plaintiffs expressly raised forfeiture in their respondents' brief, we would have expected defendants to address the issue in reply, either by challenging the trial court's procedural conclusions concerning their conduct with respect to the forms or by raising a recognized exception to the forfeiture doctrine on appeal. Their failure to do so reinforces our conclusion that the issue has been forfeited.

American Christian community," but also that plaintiffs' damages could not have been the result of defendants' published statements because the Korea Daily articles were published to a much larger audience.

1. Background

Toward the end of trial, defendants called Jang to testify. After stating at the outset of his testimony that he had been employed by Korea Daily since 2007, Jang was asked whether he had received any awards in journalism, and he responded that he "was awarded by the American Media for highest honor for the international religious aspect."

At that point, the trial court called a sidebar conference during which it asked defense counsel for an offer of proof as to the relevance of Jang's testimony. Counsel stated that Jang was a reporter from the Korea Daily and "[t]here are some articles[,]" written in "2013 to 2015[,]" which contained the "same contents of NewsM articles."

When the trial court inquired about the relevance of the similarity between the Korea Daily and NewsM articles, counsel stated, "That NewsM did not have an agenda to attack Pastor Choi and/or [InChrist]. The matters written about and reported are from other agencies as well. They were very widely controversial matters that many other newspapers wrote about and dealt with. Pastor Choi made it sound like NewsM only wrote about them because he suspected he didn't give donation. Pastor . . . Choi said yesterday that it's because NewsM likes to write negative articles about churches."

The trial court disagreed that the articles were relevant to the trial and asked again for the relevance of Jang's testimony, "I'm not sure what this has to do with [NewsM's] alleged defamation . . . of [InChrist] and Pastor Choi."

Counsel responded, "One of the articles, Exhibit 1, is Pastor Choi dumping of the Downey Church, which was around May of 2013. That's one of the Reporter Yang articles as well. [¶] There's other articles that he's written not in evidence, and that's what we're going to get to."

The trial court responded that "We're not going to get to anything that we don't have a copy of here. I can say that right now."

The trial court then reviewed copies of proposed Exhibits 116 and 117, and observed, "Exhibit 116 was written May 27, 2013. Are there any allegations in the complaint about this because I am looking at 116 and 117, and I don't recall any allegations of this. Yes, some of it has been talked about because he left the church suddenly, went away, and didn't come back. That doesn't have anything to do with the allegations in this case, as far as I can see."

Counsel responded: "Yes, Your Honor. It has to do with the first article which Reporter Jung[8] wrote. That is what plaintiff is alleging is to be defamatory, that he left the church, dumped the church, and went ahead and opened up a new church. That was also Mr. Jung's article that he wrote. [¶] There was also mention of Mr. Jung by Pastor Choi in which he said he went to Korea[] Daily to make some type of complaint, he did so with Korea[]

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[8] Defendant Jae Young Yang was alleged to have written the defamatory NewsM articles. Yeol Jang was the witness who would testify about the proffered Korea Daily articles.

Daily. Not with NewsM because NewsM wasn't an agency who would listen to him, versus Korea[] Daily who would listen to Pastor Choi. That was his testimony yesterday." (Italics added.)

The trial court disagreed, "No, that was not his testimony yesterday."

Counsel then additionally argued that Jang's testimony was relevant because Pastor Choi had testified that "Korea[] Daily is a reputable source who would listen to him, versus NewsM who had closed ears."

The trial court then stated, as referenced in defendant's opening brief, "Well, we're not going to get into this, so I'm going to excuse him [Jang] as a witness." But when defense counsel inquired whether she could ask the witness about Jang's encounter with Pastor Choi and other topics, the court decided not to excuse the witness and modified its ruling, "I'll let him off the stand. You can call your next witness. Maybe you can call him back again after you find out and you give me [an] offer of proof [of] what's going to be said."

After defense counsel completed her examination of the next witness, the trial court inquired, "Did you want to break to speak to your other witness, or not?" Defense counsel responded that she did not need a break, and the court then excused the witness. The defense rested.

2. Analysis

As an initial matter, given the record on appeal, it is not clear that counsel made an adequate offer of proof as to the relevance of the evidence which defendants now claim the trial court excluded. (*Shaw v. County of Santa Cruz* (2008) 170

Cal.App.4th 229, 282 ["[T]he failure to make an adequate offer of proof in the court below ordinarily precludes consideration on appeal of an allegedly erroneous exclusion of evidence"].)

On appeal, defendants contend that the articles and Jang's testimony were relevant to Pastor Choi's status as a limited purpose public figure, damages, and causation. But during her offer of proof, counsel never used the terms "limited purpose public figure," "damages," or "causation." While counsel did point out that the proffered articles contained "the same contents of NewsM articles," she did not specifically articulate the argument that defendants now pursue on appeal. Rather, counsel argued that the similarity between the articles was relevant to NewsM's lack of "an agenda to attack Pastor Choi and/or [InChrist]," which can fairly be interpreted as bearing on the issue of whether defendants acted with malice, which the jury concluded they did not. Moreover, our review of the entirety of counsel's offer of proof suggests that any potentially salient argument about the relevance of the proffered evidence was buried in the varied and disparate additional relevance arguments presented by counsel.

Even if we were to conclude that counsel's offer of proof fairly preserved defendants' argument on appeal, the record demonstrates that the trial court did not make a final determination on whether to exclude Jang's testimony or the admission of Exhibits 116 and 117. Rather, the trial court precluded defendants from introducing such testimony until a later time, based upon a further offer of proof. ""'"Where the court rejects evidence temporarily or withholds a decision as to its admissibility, the party desiring to introduce the evidence should renew his offer, or call the court's attention to the fact that a definite decision is desired."'" (*People v. Moore* (1954) 43 Cal.2d

517, 523 . . . .)" (*People v. Holloway* (2004) 33 Cal.4th 96, 133.) Thus, defendants have not been aggrieved by the trial court's purported failure to admit relevant evidence.

D. *Excessive Damages*

Defendants argue that the jury's damage award was excessive and unsupported by the evidence. According to defendants, the "weight of the evidence did not support the excessive damages of $675,000 awarded to [plaintiffs] for defamation per se. [Pastor Choi] was awarded $75,000 for harm to his property, business, trade, or profession, $250,000 for harm to reputation, and $250,000 for shame, mortification, or hurt feelings. . . . There was no evidence of actual damages presented at trial that supported such an . . . award."

1. Legal Principles and Standard of Review

"'The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently. . . see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' [Citation.] '"The question is not what this court would

have awarded as the trier of fact, but whether this court can say that the award is so high as to suggest passion or prejudice.'" [Citation.] [¶] 'In making this assessment, the court may consider, in addition to the amount of the award, indications in the record that the fact finder was influenced by improper considerations.' [Citation.] The relevant considerations include inflammatory evidence, misleading jury instructions, improper argument by counsel, or other misconduct. [Citations.] [¶] 'There are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is "a matter on which there legitimately may be a wide difference of opinion" [citation].' [Citation.] . . . [¶] We review the jury's damages award for substantial evidence, giving due deference to the jury's verdict and the trial court's denial of the new trial motion. [Citations.] 'In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in [the] respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record [citation].' [Citation.]" (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 299-300.)

2. Analysis

Contrary to defendants' assertion, there was substantial evidence submitted at trial supporting plaintiffs' claims for actual damages. Pastor Choi testified that his congregation lost 800 members and that he and his wife suffered emotional and

physical injury due to defendants' conduct. Although Pastor Choi's testimony in that regard was arguably sufficient, by itself, to support the jury's verdict, the testimony of his expert, Bang Gul Lee, corroborated in detail the financial losses sustained by plaintiffs. Among other things, the expert confirmed that over 800 members had left during the time period the defamatory articles were published and that InChrist sustained financial losses of at least $3.7 million. Plaintiffs' documentary evidence included a list of over 800 people who left the church during the relevant time period, and Pastor Choi testified that he spoke to the majority of those members who said their departure was influenced by defendants' articles.

Given plaintiffs' evidence on damages—which is largely ignored by defendants—and the amount of the award, we cannot conclude that the trial court abused its discretion by denying defendants' motion for a new trial on the grounds of excessive damages. There is nothing in the record to suggest that the jury's actual damages award was influenced by improper considerations or otherwise the product of passion or prejudice; and the amount of the award, when viewed in light of plaintiffs' evidence, cannot be said to shock the conscience.

E. *Irregularity in Proceedings*

Defendants' final contention is that the trial court erred when it denied their motion for new trial on the grounds of irregularity in the trial proceedings. Defendants base this claim on a one-day delay in Pastor Choi's testimony during the defense case because he was not feeling well. According to defendants, the one-day delay "adversely affected [d]efendants' ability to

properly obtain testimony from [Pastor] Choi, and likely drew undue sympathy from the jury."

1. Background

On Thursday, August 31, 2017, during defendants' case, following the testimony of defendant Keedae Kim, defense counsel attempted to recall Pastor Choi in her case. When court staff informed the trial court that Pastor Choi was not present, the court asked defendants' counsel if she had informed plaintiffs' counsel that she intended to call the pastor and was informed by counsel for the parties that no prior notice of defendants' intent to recall the pastor had been provided. In response, the trial court stated, "Normally everybody lines that up the day before and tells everybody." The trial court then inquired whether someone was going to contact Pastor Choi and was informed that the pastor "didn't feel too good today. That's why [he is] not here." Based on that information, the trial court asked defense counsel to call her next witness and, without objection or any request for further information about the pastor's condition, counsel called defendant Jae Young Yang who proceeded to testify until the noon break. At the break, the trial court inquired whether Pastor Choi had been contacted and was informed the he had been and had agreed to appear for further testimony at 1:30 p.m. The trial court then took the noon recess.

Following the noon recess, plaintiffs' counsel informed the trial court that Pastor Choi had been to urgent care, but that he was present in court and available to testify. The trial court then asked Pastor Choi if he was ill, and the pastor replied "a little,"

explaining that "they ran some tests" and prescribed medication, but that he did not have a fever.

Defendants' counsel called Pastor Choi to the stand, but after only a few questions, the pastor stated, "In fact, I am not quite able to concentrate because the state of my heart is not stable." When defense counsel asked if the pastor was unable to proceed, he replied, "I may, if I can–based on the things I can recall at this time, but I don't think I am quite able to concentrate to remember things." The trial court and the witness then engaged in the following exchange: "The Court: Pastor Choi, is this a recurring problem that you have? The Witness: Yes, it is. [¶] The Court: So would it be better for you–because you have gone to urgent care, and we know that. Would it be better for you if you were to testify [the next court day, Tuesday, September 5] instead? [¶] . . . [¶] The Witness: If you would allow it, I would very much appreciate it. [¶] The Court: It's okay with the court, because if [you are] not well, I'm not going to make you testify. I'm okay with that. [¶] If he has a heart problem, I'm okay with that. He can go and he can come back on Tuesday. No one knew he was going to be called today. He didn't know he was going to be called. No one knew. [¶] Pastor Choi, you are ordered back on Tuesday morning. [You will] be our first witness. [¶] The Witness: Yes. [¶] The Court: Thank you very much. You may leave. . . . See you Tuesday. Thank you very much. [¶] Let's resume with Mr. Yang. We were on the subject of the grant deeds and the title insurance. [Defense Counsel]: Thank you, Your Honor." Defendant Yang then resumed his testimony without any objection from defense counsel.

The following Tuesday, Pastor Choi appeared as ordered and completed his testimony, again without any further objection from defense counsel.

Defendants first raised the purported irregularity in the trial proceedings in their posttrial motion for a new trial. The trial court, however, rejected that claim, ruling as follows. "The court disagrees that [the delay in the pastor's testimony] was prejudicial error. As [p]laintiffs note, [Pastor] Choi was not even aware he would be testifying on the day in question. . . . Defendants were able to cross-examine him on the next available court day. . . . Defendants never objected when the court indicated it would delay [the pastor's] testimony due to his illness. . . . In any event, there is no evidence before the court suggesting this brief event had any lasting impact on the jury."

2. Standard of Review

A ruling on a motion for new trial is reviewed for an abuse of discretion. "'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance. . . .'" (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747; see also *Schelbauer v. Butler Mfg. Co*. (1984) 35 Cal.3d 442, 452; *Jiminez v. Sears, Roebuck & Co*. (1971) 4 Cal.3d 379, 387.)

3. Analysis

We disagree that the trial court's denial of the new trial motion on the ground of irregularity in the proceedings was a prejudicial abuse of discretion. The record reflects that the one-day delay in Pastor Choi's testimony during the defense case was the result of an illness. Pastor Choi represented to the trial court that he had gone to urgent care the morning of his testimony for treatment of a recurring heart problem. While there, he underwent testing and was prescribed medication. At the beginning of his testimony that afternoon, the pastor indicated that he was having difficulty concentrating on the questions and that he was not feeling well. Based on that information, which was not challenged or questioned by the defense, the trial court decided to delay the pastor's testimony until after the long Labor Day weekend to allow him to recover from his illness.

The trial court's decision to delay the testimony was grounded in fact and reasonable under the circumstances. Faced with a seemingly ill witness, the trial court took a prudent and careful approach by delaying the testimony until the next court day. Under the court's ruling, defense counsel was still able to continue her exam of another witness so that the completion of defendants' case was not hindered or delayed in any manner. Indeed, defense counsel recognized the reasonableness of the ruling by not objecting to it. Moreover, defense counsel did not request the trial court to admonish the jury regarding sympathy for the pastor due to the brief illness, likely because, as the trial court concluded, the event had no potential to have a lasting impact on the jury. Based on the record of this issue, there was no abuse of discretion.

IV. DISPOSITION

The judgment of the trial court is affirmed. Plaintiffs are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.